

1 H. MILLER

2 UNITED STATES BANKRUPTCY COURT

3 SOUTHERN DISTRICT OF NEW YORK

4 -----X

5 In Re:

6 Chapter 11

7 LEHMAN BROTHERS

Case No. 08-13555 (JMP)

8 HOLDINGS, INC., et al., (Jointly Administered)

9 Debtors.

10 -----X

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14 VIDEOTAPED DEPOSITION OF HARVEY R. MILLER

15 New York, New York

16 January 7, 2010

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23 Reported by:

24 KATHY S. KLEPFER, RMR, RPR, CRR, CLR

25 JOB NO. 26535

1 H. MILLER

2 January 7, 2010

3
4 VIDEOTAPED deposition of HARVEY R.
5 MILLER, held at the law offices of Weil,
6 Gotshal & Manges, LLP, 767 Fifth
7 Avenue, New York, New York, before Kathy
8 S. Klepfer, a Registered Professional
9 Reporter, Registered Merit Reporter,
10 Certified Realtime Reporter, Certified
11 Livenote Reporter, and Notary Public of
12 the State of New York.
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1 H. MILLER

2 with overflows. There was a Clarification
3 Letter which was being worked on, and we were
4 hoping that the Clarification Letter would get
5 to the courthouse sometime at the beginning of
6 the commencement of the hearing or during the
7 hearing.

8 So my partner Lori Fife was at 745
9 Seventh Avenue. She was involved in those
10 discussions, and she got down to the courthouse
11 probably around 3, a little bit after 3. The
12 Clarification Letter was not completed, and what
13 we proposed was that we would orally present to
14 the assemblage the essence of the Clarification
15 Letter. And Judge Peck agreed, and he went into
16 his chambers and Ms. Fife spoke to the
17 assemblage in the courtroom and described what I
18 believe were the essentials of the Clarification
19 Letter. And that went on, I don't know, half
20 hour, 35 minutes, 40 minutes. And my best
21 recollection is the hearing must have started
22 around 4 P.M., and it went from 4 P.M. to about
23 12:01 A.M. on the 20th.

24 I guess that Judge Peck announced his
25 decision just about midnight, and somehow the

1 H. MILLER

2 order of approval got dated September 19th,
3 although I always thought it was two or three
4 minutes after midnight. He heard all the
5 objections. Mr. McDade testified. There were
6 proffers of the direct testimony of Mr. McDade
7 and Mr. Ridings and both of them were subjected
8 to cross-examination.

9 And Judge Peck orally delivered his
10 opinion and approved the sale, and basically he
11 said words to the effect that he did not see any
12 other alternative, this was a way of preserving
13 10,000 jobs, approximately 10,000 jobs, and to
14 realize a value that otherwise would
15 substantially erode.

16 So the closing, once the sale -- I
17 don't think the order was entered till about --
18 well, let me go back. After he issued his
19 order, he got up, he got off the bench, as I
20 recall, and for the first time in my history as
21 a practicing lawyer, I never saw this happen
22 before, the entire audience in the courtroom got
23 up and started applauding.

24 And as I remember, he sort of blushed,
25 but in any event, he said that if we wanted to,

1 H. MILLER

2 he would stay around for an hour or two and
3 enter the order because there were modifications
4 being made to the order and to accommodate
5 objections that had been made. And that took
6 about an hour, an hour and a half. So,
7 actually, the order wasn't finalized and
8 submitted to chambers until around 1:30 A.M. or
9 something like that.

10 And the arrangements were made to
11 start the closing the following morning --
12 not the following, that morning. I don't know
13 what time it started in the morning. It
14 probably started around 9 A.M. is my guess. I
15 wasn't here Saturday morning or until late in
16 the afternoon.

17 And the hearing was going on. Some of
18 it I think was in this room. This entire floor
19 was devoted to the Lehman closing, and that
20 closing went from starting whatever time they
21 started on Saturday. I have learned in 50 years
22 of practice if you give time to lawyers, they
23 will fill the time, and basically it was to
24 close and consummate before the opening of the
25 market Monday morning.

1 H. MILLER

2 And the process was very difficult.

3 There were many people here from Lehman and from
4 Barclays and I think DTCC was represented. We
5 invited the representatives of the Creditors
6 Committee to be at the closing and to
7 participate fully in the closing, and Luc was
8 here and I think other people from Milbank
9 Tweed.

10 The Committee had hired FTI as a
11 financial advisor and Houlihan Lokey as
12 financial advisors, and their representatives
13 were here throughout the weekend.

14 The closing got -- transaction got
15 very difficult on Sunday because of a dispute
16 between Barclays and JPMorgan in connection with
17 the clearing account and transactions between
18 Barclays and JPM, and as a consequence of that,
19 the Federal Reserve Bank got involved, I think
20 the S.E.C. was involved, and I think it had to
21 do with \$7 billion, something equal to \$7
22 billion.

23 And finally, I think with the help of
24 the Federal Reserve, a delegation from Chase --
25 or, from JPM came to the closing. My

1 H. MILLER

2 recollection is it was Steve Cutler, who was
3 general counsel of JPM, a group from the
4 whatever division handled the clearing account,
5 the tri-party loan transactions, Hal Novikoff
6 from Wachtell Lipton. He wasn't here, he was on
7 the phone. Heidi Miller, who I think was the
8 CFO or a very senior officer at JPM was on the
9 phone, and there were people from the Fed.

10 There were a lot of people from
11 Washington that were on the phone. And there
12 was an open conference line, I can't remember,
13 it may have been in this room or it may have
14 been down the hall, to find out what the issue
15 was, what was going to hold up this transaction.

16 It had actually been surfaced either
17 Friday or Wednesday, and during the court
18 hearing when the attorney for JPM said there
19 were outstanding issues with Barclays that
20 hadn't been resolved and would have to be
21 resolved if JPM was going to open up on Monday,
22 the 22nd, for clearing accounts and transfers.

23 So we all congregated in this room
24 with 18 people, I think there were 18 people on
25 the conference line, to try and find out what

1 H. MILLER

2 And when he was pressed why, he said
3 because -- and he had a piece of paper in his
4 hand -- the securities that JPM was going to
5 release to Barclays in his view were simply not
6 worth \$7 billion. And he particularly alluded
7 to one security called the Racers, R-A-C-E-R-S,
8 which had an attributed value of \$5 billion,
9 which he said wasn't worth anything close to \$5
10 billion.

11 And Steve Cutler was -- I don't know
12 whether he had left and come back, but he was
13 here, and there was some dialogue. It went on
14 for relatively short period of time, and Steve
15 Cutler said, "Okay, let's stop. We're not
16 making any progress. I'll tell you what we'll
17 do. Barclays" -- I mean, "JPM will keep the
18 securities and give Barclays \$7 billion in
19 cash." And that was like the last major hurdle.

20 The last remaining thing from my
21 perspective was that Barclays did not want to
22 formally close until they got official
23 notification from the title company that the
24 deed to 745 Seventh Avenue had been filed in the
25 appropriate recording office, so we were all

1 H. MILLER

2 waiting in the conference room for a phone call
3 from the title company.

4 And that came in I think just before
5 the market opened. And that was the closing.
6 And then people collapsed and the clean-up crews
7 started coming in to clean up because there was
8 another transaction starting right then to sell
9 the Neuberger Berman assets.

10 And I went home and went to sleep.

11 Q. Thank you. At the time that the
12 Clarification Letter was finally completed --
13 and let me ask, when was that time?

14 A. Over the weekend.

15 Q. Over the weekend.

16 A. I can't say precisely. There was a
17 Clarification Letter that was -- I wouldn't say
18 completed -- drafted that actually got to the
19 courthouse, but my partner Tom Roberts reviewed
20 it and said that it wasn't correct. So it was
21 over the weekend. It was -- it was signed on
22 the 22nd, I think.

23 Q. The Clarification Letter, when you say
24 it was gotten to the courthouse, you mean gotten
25 to the courthouse on Friday during that hearing,

1 H. MILLER

2 during that long hearing?

3 A. I think a box came down late in the
4 hearing.

5 Q. Who got copies of the Clarification
6 Letter that weekend?

7 A. I believe, and I don't have personal
8 knowledge of it, everybody who was at the
9 closing.

10 Q. And that included members of the
11 Creditors Committee and their representatives?

12 A. They -- the members -- well, the
13 representatives of the Creditors Committee, let
14 me put it that way. I don't remember if there
15 was an actual member here. Were here throughout
16 the closing till about, I may be off by an hour
17 or so, until about 4, 3 to -- someplace between
18 3 A.M. and 5 A.M.

19 Houlihan Lokey, and I believe it was
20 Sol Burian and Mike Fazio and FTI -- his first
21 name is Michael -- were all here, and at some
22 point between 3 and 5 A.M., they basically said
23 that they were leaving and said, "Everything's
24 fine, and going forward, if it's okay with you,
25 it's okay with us."

1 H. MILLER

2 It was right after a somewhat heated
3 discussion about the 15c3-3 account which took
4 place in the hallway down the -- down, halfway
5 down the floor here.

6 Q. And what was that discussion?

7 A. Barclays took the position that the
8 15c3-3 account, which is a collateral account
9 for the benefit of customers that is subject to
10 oversight or supervision by the S.E.C., goes
11 with the customer accounts; that if you're
12 buying all the customer accounts, you get the
13 15c3 account.

14 Our position was that wasn't
15 necessarily true, that wasn't the custom in the
16 industry, and it wasn't entitled to 15c3
17 account, which was collateral for customers and
18 couldn't be moved anyway without S.E.C.
19 approval.

20 And there was a discussion about that.
21 I think Michael Klein, who was advising
22 Barclays, got into that discussion. We were
23 standing out by the reception down the hallway,
24 and Sol Burian, Mike Fazio and I think Michael
25 from FTI was also there, in which we were

1 H. MILLER

2 arguing over this. And this was, you know, this
3 was pretty close to closing time.

4 Q. On what day?

5 A. This was the morning of the 2 --
6 Monday morning.

7 Q. This is -- this is Sunday night/Monday
8 morning, after midnight?

9 A. Oh, this was I'm saying 3, 4 A.M.
10 Monday morning. I think at that point in time
11 almost everything else had been cleared up and
12 the resolution was -- like all major closings,
13 you have some adjustments -- there was a letter
14 which had been obtained or approved by the
15 S.E.C. in connection with what was thought to be
16 another transaction before the September 12th to
17 release the 15c3-3 account. And I think it was
18 in connection with possibly a sale of all of
19 Lehman without any bankruptcy or anything, and
20 in that letter a list of what was in the
21 account. And in the account was cash, PAIB
22 securities, which I can't -- at the time I knew
23 what the acronym meant, but I don't know what it
24 means now, of some 400 million, odd million
25 dollars, PAIB securities and other securities.

1 H. MILLER

2 the chain on Exhibit 20 is an e-mail from Martin
3 Kelly to Ian Lowitt, copied to Paolo Tonucci,
4 dated September 16 at 5:10 A.M., do you see
5 that, sir?

6 A. Yes, I do.

7 Q. Did you have conversations with Mr.
8 Kelly in that period you described to us before
9 the break of the 15th overnight into the 16th
10 while the negotiations were going on?

11 A. I never met Mr. Kelly.

12 Q. As a general matter, as I understand
13 your testimony this morning, the negotiation of
14 the economic terms of the deal were done by the
15 businesspeople, not by the lawyers; is that
16 right?

17 A. That's correct.

18 Q. And the economic terms that were
19 negotiated by the businesspeople were
20 communicated to the Weil Gotshal lawyers who
21 were responsible for drafting the Asset Purchase
22 Agreement, correct?

23 A. Essentially, yes.

24 Q. And the economic terms that the
25 businesspeople negotiated were communicated, as

1 H. MILLER

2 necessary, to you or Ms. Fife as the principal
3 Weil Gotshal lawyer standing up at the hearings
4 on the 17th and the 19th, is that correct?

5 MR. BOISE: Object to the form.

6 A. I would say it was broader than that.
7 Communicated to the people who were working on
8 the Asset Purchase Agreement and then probably,
9 in turn, to us.

10 Q. And none of Weil Gotshal's activities
11 on the 15th -- for the week of the 15th through
12 the 19th included any independent assessment of
13 the values being discussed with respect to the
14 assets being transferred; is that correct?

15 MR. BOISE: Objection.

16 A. That is correct.

17 Q. Directing your attention back to
18 Exhibit 20, Mr. Miller.

19 A. Yes.

20 Q. You see that it -- let me read it,
21 portions of it, into the record: "Well, it took
22 all night and lots of back and forth, but the
23 deal is done and ready for the board. Final
24 price did not change meaningfully - approx a 5b
25 all in economic loss versus our marks and 3.6

1 H. MILLER

2 billion of resi assets left behind."

3 Do you see that portion of the --

4 A. I do.

5 Q. And were you or anyone else at Weil
6 Gotshal privy to any discussions concerning a
7 negotiated -- a negotiation of an overall \$5
8 billion loss versus Lehman's marks?

9 A. I don't believe so.

10 Q. Were you or anyone else at Weil
11 Gotshal involved in any discussions concerning a
12 negotiated discount that Lehman on the one hand
13 agreed to give to Barclays on the other from
14 Lehman's book values?

15 MR. BOISE: Objection.

16 A. No, I never heard the expression
17 "discount." I did sit in a room listening to
18 groups talk about the marks and the different
19 opinions on the marks.

20 Q. Did it come to your attention in any
21 way, sir, prior to the time that you described
22 the transaction to Judge Peck on the 17th, one
23 way or the other, that there was a negotiated
24 agreement for Lehman to give Barclays a \$5
25 billion discount from Lehman's marks as part of

1 H. MILLER

2 this transaction?

3 MR. BOISE: Objection.

4 A. No.

5 Q. If you could turn your attention,
6 please, Mr. Miller, to Exhibit 21.

7 A. Yes.

8 Q. Actually, I beg your pardon. Could
9 you go back to 20 for just one second.

10 A. Sure.

11 Q. Thank you. Also, in 20, Mr. Miller,
12 there is a -- let me read another sentence from
13 Mr. Kelly's e-mail: "Also, an extra 1 billion
14 of comp beyond our accrual and assumption of all
15 trade payables in LBI and LBHI." Do you see
16 that, sir?

17 A. I do.

18 Q. Did you -- was it communicated to you
19 or anyone else at Weil Gotshal, sir, prior to
20 the time you described the transaction to Judge
21 Peck on the 17th, that there had been a write-up
22 of the amounts shown on Lehman's books accrued
23 for compensation for the purposes of the
24 transaction?

25 MR. BOISE: Objection.

1 H. MILLER

2 A. You're using the expression a
3 "write-up"?

4 Q. Yes, sir.

5 A. No, I never heard of anybody talking
6 about a write-up. The figures on comp and also
7 the figure on the assumption of executory
8 contracts was always a very contingent figure.
9 Thus, nobody knew what contracts were going to
10 be assumed and how many employees Barclays would
11 ultimately keep.

12 Q. The estimates were made in the first
13 instance by Lehman personnel, correct?

14 A. That's correct.

15 Q. Do you know who within Lehman made
16 those estimates?

17 A. No, I do not.

18 Q. Did you ever speak to Mr. Kelly at or
19 around -- at or before the time you described
20 the transaction to Judge Peck?

21 A. I don't believe I've ever spoken with
22 Mr. Kelly.

23 Q. Okay. Did you -- when you -- the
24 estimates that we're talking about for
25 compensation --

1 H. MILLER

2 A. Very much like the, if you want to
3 call them negotiations, discussions between JPM,
4 JPMorgan, and Barclays, there were discussions
5 going on with representatives of DTCC. There
6 were representatives of the LBI trustee here for
7 a good portion of the weekend also.

8 Q. Did you participate in the
9 negotiations of the DTCC letter?

10 A. No.

11 MR. BOISE: By "you," do you mean him
12 personally or Weil Gotshal?

13 Q. You personally.

14 A. No.

15 Q. Are you aware of whether anyone from
16 Weil Gotshal personally participated in any of
17 the negotiations from the DTCC letter?

18 A. Not to any great extent.

19 Q. Did you see the DTCC letter anytime
20 prior to the closing?

21 A. It was -- I don't recall seeing a
22 document. It was sort of described --
23 periodically there were sort of -- everybody,
24 everybody got together in one room and there was
25 sort of an overall report on what was happening,

1 H. MILLER

2 but I don't recall ever seeing a document.

3 Q. When you say "an overall report," what
4 do you recall of the overall report that you
5 obtained?

6 A. A status report. Are we making
7 progress? Are we going to be able to close?

8 Q. And did you ultimately understand that
9 progress was being made?

10 A. The reports were progress was being
11 made. As I said before, the big hurdle was JPM
12 and Barclays, and when that was resolved, things
13 started really moving towards a closing.

14 Q. And beyond understanding the progress
15 ultimately -- at different times was or was not
16 made, and ultimately was made, did you have any
17 further or deeper or other participation in any
18 of the negotiations with the DTCC letter?

19 MR. BOISE: Objection.

20 A. No.

21 Q. And the same, I assume, is your answer
22 with respect to as a Weil 30(b)(6) witness?

23 A. Correct.

24 MR. MAGUIRE: Thank you, sir. I have
25 no further questions.

1 H. MILLER

2 EXAMINATION BY

3 MR. TECCE:

4 Q. Good afternoon, Mr. Miller.

5 A. Good afternoon.

6 Q. My name is James Tecce. I'm an
7 attorney at Quinn Emanuel. We are special
8 counsel to the Creditors Committee. I'll be
9 very brief, sir. I just have a few questions
10 for you.

11 The closing of the sale transaction
12 took place over the weekend of September 20 to
13 21; is that correct?

14 A. Saturday, Sunday and Monday morning,
15 yes.

16 Q. And the closing took place at Weil
17 Gotshal; is that correct?

18 A. That is correct.

19 Q. Okay. And was the closing a single
20 meeting or was it a series of meetings that were
21 taking place simultaneously?

22 A. A series of meetings. This entire
23 floor was consumed with meetings.

24 Q. And do you have an understanding, sir,
25 as to whether or not Creditors Committee

1 H. MILLER

2 representatives were allowed to participate in
3 all the meetings that were taking place in
4 connection with the closing?

5 A. To the best of my knowledge, they were
6 allowed to participate in every meeting.

7 Q. Do you know whether there were any
8 meetings that they were not allowed to
9 participate?

10 A. I'm not aware of any meetings -- oh,
11 yeah. They probably weren't allowed into the
12 Barclays Room.

13 Q. The -- early in the morning of Sunday,
14 September 21, I believe you mentioned that you
15 were present when the Creditors Committee
16 representatives left; is that correct?

17 A. That was the morning -- Monday
18 morning, not Sunday morning.

19 Q. Monday morning, I'm sorry.
20 And I believe that you said that one
21 of them said to you, "If it's okay with you,
22 it's okay with us"; is that correct?

23 A. Yes.

24 Q. And who was it that said that to you?

25 A. I believe it was Sol Burian, and it

1 H. MILLER

2 was later affirmed by Luc Despins.

3 Q. And what did Mr. Despins say to you?

4 A. "If you guys are satisfied with it,
5 we're satisfied."

6 MR. TECCE: Okay. I have no further
7 questions. Thank you.

8 MR. BOISE: I have a few questions,
9 but maybe it would be useful just to take a
10 quick break, like about ten minutes. I
11 think my questions will be no longer than
12 ten minutes.

13 THE VIDEOGRAPHER: The time is now
14 12:41 P.M. We are now off the record.

15 (Recess.)

16 THE VIDEOGRAPHER: The time is now
17 12:53 P.M. We are now back on the record.

18 FURTHER EXAMINATION BY

19 MR. BOISE:

20 Q. Mr. Miller, let me ask you to look at
21 Exhibit 20, 21 and 517, which were the exhibits
22 that counsel used with you in their
23 cross-examination.

24 A. Just give me one minute.

25 20, 21?

1 H. MILLER

2 Q. 20, 21 and 517. 517 is the
3 Transaction Summary.

4 A. Okay.

5 Q. Is there anything in Exhibits 20, 21
6 or 517 that is inconsistent with your
7 understanding at the time that you made the
8 representations that you did to the Court and
9 the motion that you made to the Court on
10 September 19?

11 A. No.

12 MR. GAFFEY: Objection to the form.

13 MR. TECCE: Join in the objection.

14 MR. MAGUIRE: Objection to form.

15 Q. Let me direct your attention to
16 Exhibit 444.

17 A. Yes.

18 Q. Which is a declaration of Ms. Shari
19 Leventhal, and in particular, let me direct your
20 attention to paragraph 12.

21 A. Yes.

22 Q. Where it says that, "In connection
23 with the repo agreement, LBI was to provide
24 Barclays with approximately 49.7 billion in
25 securities in return for the \$45 billion in cash

1 H. MILLER

2 funded by Barclays. This ratio was consistent
3 with the ratio of cash to securities used in the
4 New York Fed's Repurchase Agreement with LBI on
5 the night of September 17." Do you see that?

6 A. I do.

7 Q. And was that consistent with your
8 understanding on September 19, 2008?

9 A. It is.

10 Q. Let me ask you next to look at Exhibit
11 460A.

12 A. 460A. Yes.

13 Q. And this document in the middle of the
14 first page indicates it was first sent to an
15 Arthur Bruhmuller and that Mr. Bruhmuller then
16 forwarded it on to a number of people. Do you
17 see that?

18 A. Yes, I do.

19 Q. Can you identify for the record who
20 Mr. Bruhmuller was?

21 A. Only from the e-mail, that he is with
22 Lazard. Mr. Flores is with Lehman, and -- I
23 don't know how to pronounce his name --
24 Descoteaux was with Lazard.

25 Q. And Lazard was the advisors to the

1 H. MILLER

2 A. That's what the document reflects,
3 yes.

4 Q. Let me ask you to look next at Exhibit
5 516.

6 (Exhibit 516, a document bearing Bates
7 Nos. MTHM0000139 through 147 with
8 attachment, marked for identification, as of
9 this date.)

10 A. Yes.

11 Q. And this is an e-mail from David
12 Murgio to Brian Kelly?

13 A. Correct.

14 Q. Dated September 21, 2008, correct?

15 A. That's correct.

16 Q. And you've already identified, I
17 think, David Murgio as being at Weil; is that
18 correct?

19 A. That is correct.

20 Q. And Brian Kelly was at Milbank; is
21 that correct?

22 A. That's correct.

23 Q. And Milbank was representing the
24 Creditors Committee; is that correct?

25 A. He was the attorney. And the other

1 H. MILLER

2 party to the e-mail was Mike Fazio, who was at
3 Houlihan Lokey.

4 Q. And if you look at the second page,
5 you see a smaller version of the chart that we
6 looked at earlier showing the market value --

7 A. Yes.

8 Q. -- of the repo collateral at \$49.9
9 billion, correct?

10 A. That seems to be identical to the
11 earlier exhibit that you showed me this morning.

12 Q. Now, is there anything that I've shown
13 you in Exhibit 516, 509, 507 or 460A that is in
14 any way inconsistent with the understanding that
15 you had at the time that Weil Gotshal made the
16 motion to approve the sale on September 19,
17 2008?

18 MR. TECCE: Objection to the form of
19 the question.

20 MR. GAFFEY: Join the objection.

21 A. And that's -- just could you repeat
22 the exhibit numbers, please?

23 Q. Sure. Exhibit 516, 507, 509 --

24 MR. POLKES: Let's do this, I'm sorry,
25 one at a time here.

1 H. MILLER

2 A. 507, okay.

3 Q. 509.

4 A. Okay.

5 Q. 516.

6 A. Okay.

7 Q. And 460A.

8 A. The only reservation I would have is
9 if we were apprized of a, quote, discount,
10 whatever that means, in 50 -- 460A, would have
11 brought that to the attention of the court.

12 Q. And this is the bulk discount that
13 you're referring to?

14 A. Yes. I'm not sure what it means, but
15 if there was a discount, we would have to know
16 more about it.

17 Q. Did you understand at the time that
18 there were discussions between Barclays and
19 Lazard that the marks on the securities that
20 were involved were uncertain and different
21 people had different views as to them?

22 A. I wouldn't call that a discount.

23 Q. If the Lehman marks were reduced
24 because Barclays thought either that they were
25 stale or that conditions had changed, would you

1 H. MILLER

2 call that a discount?

3 A. No.

4 Q. If the Lehman marks were reduced
5 because Barclays prevailed in its view that the
6 number should be lower, would you consider that
7 a discount?

8 (Continued on the next page to include
9 the jurat.)

1 H. MILLER

2 A. No.

3 MR. BOISE: I have no more questions.

4 MR. GAFFEY: Nothing further.

5 MR. MAGUIRE: Nothing further. Thank
6 you.

7 MR. TECCE: Nothing further. Thank
8 you.

9 THE WITNESS: Thank you all.

10 THE VIDEOGRAPHER: That concludes the
11 video record for today. The time is now
12 1:07 P.M. We are now off the record.

13 oOo

14
15
16 _____
HARVEY R. MILLER

17
18 Subscribed and sworn to
19 before me this day
20 of 2010.
21 _____
22
23
24
25